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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
10 AT SEATTLE

11 JOHNNIE WALTERS, )  
12 )  
13 Petitioner, ) CASE NO. C05-0854-JCC  
14 ) (CR04-087-JCC)  
15 v. )  
16 )  
17 UNITED STATES OF AMERICA, ) REPORT AND RECOMMENDATION  
18 )  
19 Respondent. )  
20 )  
21 )

22 INTRODUCTION AND SUMMARY CONCLUSION

23 Petitioner is a federal prisoner who is currently incarcerated at USP Victorville in Adelanto,  
24 California. Petitioner has filed a motion under 28 U.S.C. § 2255 seeking to vacate, set aside, or  
25 correct his 2004 federal court sentence. Respondent has filed a response opposing petitioner's  
26 motion. Following a careful review of the record, this Court concludes that petitioner's § 2255  
motion should be denied.

27 BACKGROUND

28 On March 2, 2004, pursuant to a plea agreement entered into with the government, petitioner  
29 pleaded guilty to a charge of causing the production of false identification documents. (CR04-87JCC,

1 Dkt. Nos. 5 and 6.) As a part of the plea agreement, the parties stipulated that petitioner would  
2 receive enhancements under the United States Sentencing Guidelines for relocating to another  
3 jurisdiction and for unauthorized use of one form of identification to obtain another. (CR04-87JCC,  
4 Dkt. No. 5 at 4.) Consistent with the agreement of the parties, the presentence report calculated an  
5 offense level of 12, which included a two level downward departure for acceptance of responsibility,  
6 and a criminal history category of V, with a resulting guideline range of 27 to 33 months. (See Dkt.  
7 No. 2 at 3.) On April 30, 2004, petitioner was sentenced to a term of 27 months confinement and  
8 judgment was entered on May 3, 2004.<sup>1</sup> (CR04-87JCC, Dkt. Nos. 12-13.) Petitioner did not appeal  
9 his sentence and his conviction therefore became final ten days after judgment was entered in his case,  
10 on or about May 14, 2004.

11 Petitioner now seeks relief from his sentence under § 2255. Petitioner argues in his motion  
12 that his sentence was imposed in violation of his Sixth Amendment rights because the sentencing  
13 scheme under which he was sentenced was mandatory in nature. Petitioner asserts that he is entitled  
14 to come back before the Court for re-sentencing under a sentencing scheme which passes  
15 constitutional muster. Petitioner relies upon the United States Supreme Court's decision in *United*  
16 *States v. Booker*, 125 S. Ct. 738 (2005), to support his claim.

17 The government, in its response to petitioner's motion, argues that the motion should be  
18 denied because (1) the decision in *Booker* should not be applied retroactively, and (2) the *Booker* claim  
19 is not available to petitioner because he procedurally defaulted on the claim by failing to raise the claim  
20 before the district court prior to sentencing or on direct appeal.

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22 <sup>1</sup> At the time petitioner entered his plea agreement in CR04-87JCC, petitioner also admitted to  
23 eight violations of his supervised release in a prior criminal case, CR98-704JCC. (See CR98-704JCC,  
24 Dkt. No. 68; CR04-87JCC, Dkt. No. 6.) Petitioner was sentenced in the two cases at the same time.  
(See CR98-704JCC, Dkt. No. 70; CR04-87JCC, Dkt. No. 12.) Petitioner received an eight month  
25 sentence in CR98-704JCC.

DISCUSSION

On June 24, 2004, the United States Supreme Court issued its opinion in *Blakely v. Washington*, 124 S. Ct. 2531 (2004). In *Blakely*, the Supreme Court addressed a provision of the Washington Sentence Reform Act which permitted a judge to impose a sentence above the statutory range upon finding, by a preponderance of the evidence, certain aggravating factors which justified the departure. *Id.* at 2535. The trial court relied upon this provision to impose an exceptional sentence which exceeded the top end of the standard range by 37 months. *Id.* The Supreme Court held that this exceptional sentence violated the Sixth Amendment because the facts supporting the exceptional sentence were neither admitted by petitioner nor found by a jury. The Court explained that "the statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Id.* at 2537 (emphasis in original).

On January 12, 2005, the Supreme Court issued its ruling in *United States v. Booker*, 125 S.Ct. 738 (2005). In *Booker*, the Supreme Court addressed *Blakely* in the context of the Federal Sentencing Guidelines and concluded that the Sixth Amendment, as construed in *Blakely*, applies to the Federal Sentencing Guidelines. *Id.* at 745. The Supreme Court remedied the Sixth Amendment problem by excising the provision of the Sentencing Reform Act which made the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), thus rendering the guidelines effectively advisory. *Id.* at 764-5.

The Ninth Circuit recently held that *Blakely* does not apply retroactively to cases on collateral review. *See Schardt v. Payne*, 414 F.3d 1025 (9<sup>th</sup> Cir. 2005); *accord, United States v. Price*, 400 F.3d 844, 845 (10<sup>th</sup> Cir. 2005). In addition, all of the circuit courts that have considered whether *Booker* applies retroactively have held that it does not. *See Never Misses a Shot v. United States*, 413 F.3d 781, 783-84 (8<sup>th</sup> Cir. 2005); *Lloyd v. United States*, 407 F.3d 608, 615-16 (3d Cir. 2005); *Guzman v. United States*, 404 F.3d 139, 143-44 (2d Cir. 2005); *Varela v. United States*, 400 F.3d 864, 868 (11<sup>th</sup>

REPORT AND RECOMMENDATION

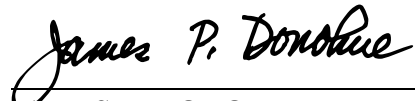
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1 Cir. 2005); *Humphress v. United States*, 398 F.3d 855, 860-63 (6<sup>th</sup> Cir. 2005); *McReynolds v. United*  
2 *States*, 397 F.3d 479, 480-81 (7<sup>th</sup> Cir. 2005). The reasoning expressed by the Ninth Circuit in *Schardt*  
3 applies with equal force in the *Booker* context. Thus, the government is correct in its assertion that  
4 petitioner may not rely on *Booker* in his § 2255 motion. Because this disposes of petitioner's claim  
5 that he is entitled to be resentenced under the statutory scheme as set forth in *Booker*, the Court need  
6 not address the government's alternative argument that petitioner procedurally defaulted on this claim.

7 CONCLUSION

8 For the reasons set forth above, petitioner's § 2255 motion must be denied. A proposed order  
9 accompanies this Report and Recommendation.

10 DATED this 29th of August, 2005.

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13 JAMES P. DONOHUE  
14 United States Magistrate Judge  
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